The End of the European Union as We Know It

verfassungsblog.de/the-end-of-the-european-union-as-we-know-it/

Bojan Bugaric Di 22 Nov 2016

Di 22 Nov 2016

The European Union is facing a political crisis unprecedented in its 59-year history. This club of democratic countries established primarily to promote peace and prosperity in post-war Europe is facing a nationalist and populist surge that threatens the democratic principles at the very heart of the EU. Capitalizing on the European sovereign debt crisis; backlash against refugees streaming in from the Middle East, Brexit and public angst over the growing terror threat, previously fringe political parties are growing with alarming speed.

The blame falls in part on both center-right and center-left party leaders who have failed to respond effectively to the European debt crisis. This fact is often obscured with the current focus on migration crisis as the single most important contributor to the populist's surge. As Vivien Schmidt correctly argues, it is "neo-liberalism gone too far", which is the major contributor to anger that fuels the rise of populism in Europe and elsewhere in the world. The ruling parties' obsession with fiscal austerity, and with supply-side policies of privatization, deregulation and liberalization, effectively triggered a 'lost decade' of economic stagnation, rising unemployment, increasing poverty, and dwindling EU solidarity that paved the way for the poisonous ultra-nationalism now on the rise. All this has driven trust in the EU at an all-time low, and fueled pathologies not seen since the 1930s, placing Europe's integration project on truly precarious ground.

But, as the authors of The End of the Eurocrats' Dream – edited by Damian Chalmers, Markus Jachtenfuchs and Christian Joerges – argue, the institutional responses to the crisis very much represented a continuation of a Union way of doing thing. Therefore the evolution of the crisis was not merely a result of economic and fiscal policy choices but reflected broader structural features of the European Union construction which the crisis exposed (p.6). One of these features, which occupies an important place in the book, is the emergence of a new constitutional order in the EU, focused on "sacralisation" (p.8) of balanced budgets and fiscal discipline, leading to a new "austerity" Union. With several Treaty amendments and other ‚turbo-speed' legislative activities aimed to solve the euro-zone debt crisis, the Centre-Right coalition under a strong hegemony of the German Chancellor Merkel has fundamentally transformed the European "economic constitution". With adoption of the Fiscal Treaty, ESM, European Semester, Euro Plus Pact, Six Pack, the EU risks undermining the 'substantive balance' between the market integration and social policy that sustains the legitimacy of the integration project. While previous Treaty amendments tilted the EU economic constitution strongly into the neo-liberal direction, they nonetheless included legal provisions protecting redistributive autonomy of member states at the national level. This time, to quote Chalmers, the ‚Union has been transformed into a political system redistributing significant wealth within its territory'. For the first time in the EU history we see an emergence of a new economic constitution which explicitly entrenches one economic paradigm at the expense of other alternatives, with simultaneously dismantling the remaining protections of social policy autonomy of member states. This approach is not only constitutionally problematic, but also economically questionable. It threatens the very existence of the EU as we have known it. The economic theory behind all these rules is that a profligacy of ‚irresponsible' states and their public sectors is the main reason for the current euro crisis. Hence, the best approach to solve the crisis is to impose strict new rules which aim to discipline such ‚irresponsible' countries. In other words, the imposition of strict austerity through balanced budgets and stricter fiscal rules became the new, dominant economic ideology of the EU's current leadership, led by Merkel. Despite the fact that the austerity approach rests on a wrong diagnosis of the euro crisis, that it does not work economically, and that it has strong negative economic and social consequences for indebted countries, it still remains the virtually unchallenged ‚official' economic doctrine of the current EU leadership.

The good news is that this trend can be reversed—but only if European political leaders articulate a coherent alternative to the failed neo-liberal economic policies of the last decade. An economic policy that promotes growth, better jobs and wages, and social inclusion can stem the nationalist tide. To prevent history from repeating itself, Europe must act now. Since the beginning of the Euro-zone economic crisis in 2009, governments across Europe have single-mindedly embraced fiscal austerity. This has meant double-digit government spending cuts, and the elevation of the austerity paradigm spearheaded by German Chancellor Angela Merkel to an essentially ‘unbreakable law.’ The new Fiscal Compact, a treaty signed by all EU members except the United Kingdom and the Czech Republic, effectively outlaws the counter-cyclical economic policies espoused by Keynesianism, and establishes austerity and balanced budgets as the new fundamental principles of the EU constitutional order. As one American observer noted sarcastically, such developments should make Tea Party loyalists in the United States green with envy. The Fiscal Compact deviates from traditional EU values of democracy, institutional balance and the equality of member states. It empowers European bureaucrats, judges and bankers at the expense of European citizens. As a result, the Fiscal Compact seriously preempts the most basic democratic principles and values of the EU. While it is true that the Fiscal Compact mostly reproduces already existing provisions of EU law, its importance should not be underestimated. First, its core provision, Article 3, requires a transposition of the golden rule of balanced budgets into member states’ national constitutions. As a consequence, the economic theory of austerity will be, for the first time in the EU history, constitutionalised on both the EU and national level. In other words, Keynesianism is ruled out precisely when it is most needed. Article 3 (2) requires that provisions in national constitutions have “binding force and permanent character”. Hence, the new Austerity Union will be almost impossible to change. Second, it restricts fiscal policy of member states more than the existing EU Treaty does. Third, access to financial assistance under ESM will be conditional, from 1 March 2013, on prior ratification of the Fiscal Compact. After the European Court of Justice ruling in the Pringle case, where the Court basically constitutionalised the principle of strict conditionality from the ESM Treaty, countries seeking financial assistance from ESM will be subjected to even more explicit forms of fiscal retrenchment imposed through the Memoranda of Understanding which struggling Member States have to “negotiate” with the troika made up of the EU Commission, the IMF and the ECB.

It is a surprise then that authors like Wolfgang Streeck, Fritz Scharpf and Perry Anderson describe this situation as sovereignty “on paper”, an “occupation regime by the “Troika”, and a troika diktat regime “reminiscent of Austria in 1922, when the Entente, under League of Nations colors, posted a high commissioner to Vienna to run the economy” . It is obvious that in the new Austerity Union, countries like Greece, Portugal and Ireland will be treated differently from other states in the EU. For example, Ireland, the only country to have a referendum on the Fiscal Compact, voted for the Compact, but, with the EU gun to its head, as the Irish media sarcastically reported. Or, in Slovenia, another small EU country, the Constitutional Court justified its ban of two referendums on the government austerity package legislation with references to the Fiscal Compact even before it entered into force. What these cases show is that the profound transformation of the EU constitutional order is altering the “original” constitutional balance in the European Union. The new Austerity Constitution deepens the divide between the core and periphery in the Union.

The Fiscal Compact has brought not only a deep intrusion into the fiscal maneuvering room of the member states. It is also too rigid and too restrictive in terms of its budgetary and fiscal rules. Although many of its rules are ambiguous, that does not solve the problem of rigidity of its main “targets”: i.e. rules on allowed structural budget deficit and public debt. As the IMK study shows, few of the EU countries undergoing severe economic crisis would be able to implement these rules without seriously undermining its prospects for future economic growth. Likewise, one of the leading legal EU scholars, Damien Chalmers, argues that obligations from the Fiscal Compact have to be assessed in a particular socio-economic context. This leads him to an important observation about a differentiated impact of the Fiscal Compact on two different groups of countries: those few like Germany, Finland, Luxemburg and Estonia who already have a balanced budget will not be particularly affected, whereas the overwhelming majority of others will face very demanding requirements. Needless to say, countries like Greece, Portugal and Spain may in fact in the end achieve required “targets” but the cost for that is already prohibitively high. Greece, for example, a country ranked 18th according to the UN Human Development Index in 2008, is today on the verge of a humanitarian crisis.

However, the fact that that largely arbitrary rules on debt and deficit have already had a detrimental effect can also be clearly seen also from those countries which are used as role models for fiscal rules. Switzerland, which first introduced the debt brake in 2003, today has indeed a very low debt-to-GDP ratio, but its levels of public investments are among the lowest in the developed world (please read the analysis here). Germany, the main “exporter” of balanced budget rules and debt brakes also faces a critical lack of public investment in areas such as green energy and education.

From the perspective of comparative constitutional law, the Fiscal Compact opens another important constitutional issue: is a constitution the appropriate place to entrench a particular economic ideology or policy? As Justice Holmes argued in his famous Lochner dissent, people in democracies have different, often opposing views on economic policy. It would therefore be wrong to entrench one particular economic ideology/policy in the constitution. In Hollande's opposition to transpose the Fiscal Compact into the French constitution, we can clearly see the echo of Holmes's argument. Hollande's argument was that the constitution is a lasting document which should not be used for short term policy objectives. As a result, France announced that it will transpose the golden rule of balanced budget into their organic law. Several other countries debated whether to include the golden rule in their constitution or legislation. Such a decision is part of the constitutional and institutional tradition of each of the countries, and there can be no universal proscription as to what and when to include or exclude from the constitutions. To include a certain economic doctrine at the constitutional level may shrink the space for constitutional pluralism and the democratic deliberation processes. It may lead to the impoverishment of the public discourse on alternative possibilities and impoverish the level of constitutional democracy.

By introducing "a double bind", first on the EU level in the Fiscal Compact, and second in national constitutions incorporating the golden rule into their provisions, EU law constitutionalizes austerity as a permanent character of the EU constitutional order. Moreover, by introducing such changes without a proper democratic procedure, it also preempts democracy as a guiding principle of EU politics.

It is no surprise then that even such pro-EU figures as Jacques Delors fiercely criticise the Fiscal Compact. In a speech in the European Parliament, Delors referred to the Fiscal Compact as a gas factory ("usine a gaz"). For lawyers, it is also very indicative that some of the leading European legal experts, such as Jean-Claude Piris, have expressed their doubts. Piris, the former director general of the EU Council's legal service who helped pen the Maastricht, Amsterdam, Nice, Constitutional Treaty and Lisbon treaties, referred to the EU's new Fiscal Compact as a "little piece of paper" and "a treaty outside a treaty" that could not stop the financial crisis. He has also mentioned that the austerity measures have a limited reach. He recommended that the national parliaments have a greater say in addressing the European financial and economic crises to ensure democratic legitimacy.

The problem is that this myopic austerity focus rests on a misdiagnosis of the Euro crisis; has backfired economically, and has triggered grave social and economic repercussions in indebted countries. Nevertheless, austerity remains the virtually unchallenged 'official' EU economic doctrine. What Europe needs more than anything is a new anti-austerity coalition. Only a Europe willing to revert back to some basic Keynesian policies of economic stimulus, as the US government did at the outset of Barack Obama's presidency, combined with economic innovations that include much-needed investments in infrastructure, education, and social programs, can restore Europe to stability, and reverse its dangerous nationalist surge.

Unfortunately, the politically weakened European mainstream parties — the traditional standard bearers of the post-World-War-II "embedded liberalism" consensus — are now on the defense. Instead of offering novel progressive solutions, the mainstream seems extremely vulnerable to the populist challenge coming both from the extreme Right and extreme Left. Instead of surrendering to the populist's false promises of quick fixes, the mainstream has to reinvent itself. It must respond to the social anxieties that are helping fuel nationalist populism. Populist leaders are promising better pensions, health care and more jobs, an agenda that is winning over the abandoned working class communities that were once a stronghold of the European social democratic and other progressive parties. Leaders of the socially oriented parties can reverse the nationalist trend by returning the EU to its initial role as the promoter of European solidarity and equality, specifically through job training, 'green' growth and other public investments. As the humiliating defeat of Greece's Leftist government by the German-led austerity coalition illustrates, this will take a concerted, Europe-wide initiative. If European democrats of various political colours don't start offering a more compelling agenda, Europe is on a dangerous political path.

SUGGESTED CITATION Bugaric, Bojan: *The End of the European Union as We Know It, VerfBlog,* 2016/11/22, http://verfassungsblog.de/the-end-of-the-european-union-as-we-know-it/.